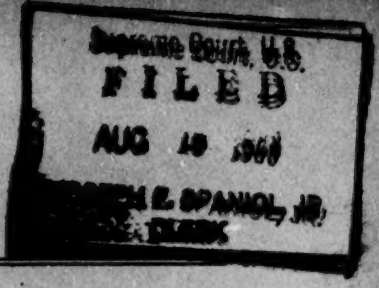

(2)

No. 87-1873

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY,
Petitioner,

VS.

ROBERT AREHART,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: August 18, 1988

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QUESTIONS PRESENTED

1. Does 28 U.S.C. Section 1441(c) confer "pendent party" jurisdiction on the federal courts to hear non-federal causes of action between non-diverse parties when the non-federal claim involving a different defendant has been joined with a separate and independent federal claim previously removed from state to federal court?

2. Does the so-called *Bryant* "bright-line" rule precluding removal of California Doe defendant cases to Federal Court until all Doe defendants have been named, dismissed or unequivacally abandoned, "negate the diversity jurisdiction of the District Courts, deny Due Process of Law, and unconstitutionally interfere with access to the federal courts?"

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STATEMENT OF THE CASE

Dow claims that the first "exchange" regarding California Doe defendants was at oral argument before the Ninth Circuit Court of Appeals on January 15, 1988.

However, Dow appears to have overlooked two separate requests for relief. The first was the "Memorandum of Points and Authorities in Opposition to the Motion for Summary Judgment" filed in the Federal District Court on January 30, 1987, which stated:

> "For the foregoing reasons, plaintiff respectfully requests the Court to deny the respective motions for summary judgment and to remand the cause to the superior court for final resolution on the factual merits under the determinative law."

Second, the foregoing was brought to the court's attention at the Motion for Summary Judgment hearing in the Federal District Court on February 12, 1987, as the Reporter Transcript of 2/12/87, at page 10, indicates:

> "THE COURT: Okay. I'll get to you in a minute, please. All right. I have no trouble with this case falling within the National Labor Relations Act unless you can tell me something that I've missed.
>
> MR. COOPER: Well, that was the case—under the six-month statute of limitations, we would ask that the court remand the remaining counts under the complaint to a state court.
>
> THE COURT: Well, that's not before me.
>
> MR. COOPER: Pardon me?
>
> THE COURT: That's not before me, the remand.
>
> MR. COOPER: Well, it was brought up as a relief in request on the Memorandum of Points and Authorities."

Further, the "Brief for Appellant" (p.24) filed in the Court of Appeals on July 13, 1987, argues under the caption "J":

> "J. Having granted co-defendant Local Union 342's Motion for Summary Judgment, the trial court lost ancillary jurisdiction over the claim against Dow Chemical, and the action should have been remanded to the state court immediately."

Finally, "Appellant's Reply Brief" (p.1) filed with the Court of Appeals on August 28, 1987, set forth in the first three page argument under the caption "A":

> "A. There is no jurisdiction over the claims against the Dow Chemical Company."

Therefore, Dow's "Statement of the Case" is misleading as the issue of jurisdiction over the Dow cause of action which was first mentioned in the requests for relief in the Federal District Court and argued in the Robert Arehart briefs in the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals properly reversed and remanded the decision of the District Court granting the Dow Chemical Company a summary judgment where the court lacked pendent claim jurisdiction under 28 U.S.C. 1441(c) and where unidentified California Doe defendants precluded diversity of citizenship jurisdiction under 28 U.S.C. Section 1332(a).

ARGUMENT

A. The decision of the Court of Appeals clearly demonstrates that the Dow Chemical Company was merely a pendent party without "pendent claim jurisdiction" to a separate and independent federal cause of action involving a separate defendant under 28 U.S.C. 1441(c)

Dow's pendent party jurisdiction argument first appeared in a "Supplemental Brief" filed on January 19, 1988, four days after briefing and submission of the cause of action following oral argument before the Ninth Circuit Court of Appeals on January 15, 1988.

Presently, Dow argues that the District Court had "pendent party" jurisdiction for "separate and independent claims" under 28 U.S.C. Section 1441(c).

28 U.S.C. Section 1441(c) provides for removal of pendent claims against the same defendants already properly before the court on a separate and independent claim or cause of action.

Dow was not a party properly before the District Court when the separate and independent claim or cause of action against the United Association of Pipe Fitters and Plumbers, Steamfitters' Union Local 342 was removed from state court to federal court.

The claims against Dow would not be "removable if sued upon alone," and thus Dow was merely a "pendent party" not within the pendent claim jurisdiction of the District Court under 28 U.S.C. 1441(c).

Dow seems to ignore the "Memorandum Opinion" of the Court of Appeals which sets forth, at page 7, "Dow, however, appears to

have confused pendent claim jurisdiction with pendent party jurisdiction."

Explaining the difference, the Opinion clarified that pendent claim jurisdiction rests on the fact that the pendent claim is against the *same defendant* who is already properly before the District Court on a separate and independent claim, "which would be removable if sued upon alone, . . .".

The Opinion continues, "This circuit historically has been hostile to the concept of pendent party jurisdiction" (where the defendant is *not* already in federal court on a federal claim). *Safeco Ins. Co. v. Guyton*, 692 F.2d 551, 555 (9th Cir. 1982).

The Court of Appeals has further held "that pendent jurisdiction does not permit a new party to be added to a case absent an independent jurisdictional basis." *Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999, 1000 (9th Cir. 1984).

Therefore, because Dow was merely a "pendent party," not otherwise before the court on a nonremovable claim, against a separate defendant, the Ninth Circuit Court of Appeals correctly decided that Dow was not properly before the District Court under "pendent claim jurisdiction" as set forth in 28 U.S.C. Section 1441(c).

B. The *Bryant* rule holding "that the presence of Doe defendants law destroys diversity and, thus, precludes removal," clarifies the law by setting forth exact standards for determination of whether or not the District Courts have diversity of citizenship jurisdiction under 28 U.S.C. 1332(a)

California Doe defendant law permits a plaintiff to proceed against fictitiously named defendants under Code of Civil Procedure Section 474:

> "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly;"

Further, the three year statute of limitations within which to identify and serve California Doe defendants is provided under Code of Civil Procedure Section 583.210:

> "(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed."

In the landmark decision of *Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987), the Ninth Circuit Court of Appeals in an eight judge majority opinion set forth the "general rule" holding:

> "[T]he presence of Doe defendants under California Doe defendant law destroys diversity and, thus, precludes removal. The nature of the allegations against such Doe defendants is irrelevant for federal removal purposes."

This decision "overrule[s] all of our cases creating exceptions to this general rule," and determined, "This new rule will apply retroactively" (*Id.* at 1083, fn. 6).

On the basis of this rule in *Bryant v. Ford Motor Co., supra.*, Dow argues, "[A]ll Doe defendants are conclusively presumed to be real and nondiverse." ("Petitioner's Brief" hereinafter "P.B.," p.8). Dow continues, "The irrebuttable presumption adopted by the Ninth Circuit dramatically restricts the legitimate scope of diversity jurisdiction by preventing the exercise of jurisdiction in large numbers of cases in which such jurisdiction actually exists." ("P.B.," p.9).

However, review of the opinion in *Bryant* reveals that the statement regarding the so-called "irrebuttable presumption" appears only in the single concurring opinion of Circuit Judge Norris (*Bryant, supra.*, at 1084).

Dow's entire argument is repeatedly based on this false premise of an irrebuttable presumption which distorts the logical reasoning process leading to the erroneous conclusion that the *Bryant* rule unconstitutionally restricts diversity of citizenship jurisdiction in the federal courts.

Quite the opposite, *Bryant* does not "conclusively presume" that all Doe defendants are "real and nondiversive," rather, *Bryant*, *supra.*, p.1083, holds:

> "Instead, the 30-day time limit for removal contained in 28 U.S.C. Section 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court."

Further, *Bryant* footnotes, *supra.*, at 1083, fn. 5:

> "Unequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants."

In other words, *Bryant* does *not* "conclusively presume" anything, rather the *Bryant* Court refuses "to make the near-impossible determination of when the allegations against Doe defendants are 'specific' enough to defeat diversity" (*Bryant*, *supra.*, at 1083).

Dow argues there is no "justification" for the new rule which overrules one of the exceptions for removal where Doe defendants are shown to be "fictitious" or "shams".

Bryant notes there was "considerable confusion" and "doctrinal disarray in our decisions" which "unfortunately remain shrouded in mystery and confusion."

The *Bryant* rule does not deny diversity of citizenship jurisdiction, rather the new rule holds that California Doe defendant cases are not "ripe" for removal until all Doe defendants have been identified, dismissed or unequivocal abandonment."

Bryant, *supra.*, at 1083 concludes:

> "This new rule accommodates both a plaintiff's right under California law to a three-year extension of the statute of limitations and a defendant's statutory right to removal under 28 U.S.C. Section 1441."

The article by William Slomanson, entitled "John Doe Strikes Out in the Ninth," *California Lawyer*, May, 1988 ("P.B.," attached as Appendix C), is enlightening with regard to *Bryant's*

"bright-line" rule, but inaccurate and misleading with regard to the holding in *Bertha v. Beech Aircraft Corp.*, 674 F.Supp. 24 (C.D. Cal. 1987).

Dow claims, "One District Court (*Bertha*) has already declined to follow a portion of the *Bryant* decision as "dicta" ("P.B.," p.11), and the article claims that in *Bertha* ("P.B.," p. A-14):

> "Because the plaintiff's at-issue memorandum stated that all essential parties had been served and that no others would be served prior to trial, said the court, closer analysis revealed that 'removal was both timely and proper and that remand should be denied.' "

However, *Bertha, supra.*, at 26, specifically provides:

> "It would seem that if a litigant, in light of Section 583.210, allowed three years to pass from the commencement of his or her action without serving either named or Doe defendants, that could be said to be an unequivocal abandonment of all unserved parties on the lapse of three years."

The definition of "unequivocal abandonment" was "dicta" in *Bryant,* at p. 1083, fn. 5, as stated in *Bertha*, at p.26.

However, just as *Bertha* criticized *Bryant* as "dicta" regarding "unequivocal abandonment," so in turn *Bertha's* opinion with regard to "papers" as evidencing intention to abandon in the "memorandum at-issue" as also including a "status conference statement" is itself "dicta" and not controlling under the instant set of circumstances (*Bertha, supra.*, at 27).

The instant "status conference statement" stating, ("P.B.," Statement of the Case, p.3), "All parties except Dow Chemical Company have been served, and Dow Chemical Company is presently being served," is *not* akin to the "memorandum at-issue" in *Bertha* which clearly indicated an intention to abandon the Doe defendants which had not been identified or named and served before running of the three years statute of limitations provided under Code of Civil Procedure, Section 583.210.

Finally, "[A]n important factual distinction" from *Bryant* and this case is *not* that in "*Bryant* the plaintiff had identified and wished to serve certain real entities as Doe defendants; [and] in this case, in the District Court, the Doe defendants were acknowledged to be, and are to this day, phantoms." ("P.B.," at p.11).

Rather, and similar to *Bryant*, after the District Court granted the motion for summary judgment, the plaintiff Arehart challenged the jurisdiction over the cause of action against Dow on appeal (Note: "Statement of the Case," *supra*, at p. 1) and the "Memorandum Opinion" (pp.6-7) of the Ninth Circuit Court of Appeals expressly found that Arehart did *not* "unequivocally abandon" the Doe defendants, and, "In fact, Arehart stated at oral argument that he intended to conduct additional discovery and to amend his complaint to name some of the unidentified Doe defendants."

CONCLUSION

In clarification of the limited pendent claim jurisdiction and diversity of citizenship jurisdiction over California Doe defendant cases in the federal courts, the instant "Memorandum Opinion" of the Ninth Circuit Court of Appeals has followed both the letter and the spirit of the law set forth under the authority of determinative case law which has resolved prior conflicting decisions and settled important questions of federal law.

Therefore, for the foregoing reasons, Arehart respectfully requests that the Petition for Writ of Ceriorari to the United States Court of Appeals for the Ninth Circuit be denied and the case remanded to the California Superior Court for continued pretrial discovery and trial on the merits.

Respectfully submitted,

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